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Supreme Court of the United States.

OCTOBER TERM, 1898.

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M. J. NUGENT, SUPERINTENDENT OF TERRITORIAL PRISON, APPELLANT,

vs.

THE STATE OF ARIZONA IMPROVEMENT COMPANY, APPELLEE.

APPELLEE'S BRIEF.

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IN THE

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STATEMENT.

This is an application for a writ of mandamus requiring the defendant to furnish the plaintiff ten (10) convicts out of the territorial prison at Yuma.

The application is based upon a contract executed between the Territory of Arizona, through its Board of Control, and the plaintiff. The Board of Control was created by a special act of the territorial legislature, which is set forth in full in the appellant's brief. This board has full and

exclusive control of the convicts. It consists of three members, of whom the governor is *ex officio* one. By the terms of the contract it was provided that the plaintiff should have exclusive control of all the able-bodied male convicts in said prison from the hours of 8 a. m. until 5 p. m., and that the superintendent of the prison should "be required" (Record, fol. 9) to furnish said convicts to the plaintiff upon demand. The plaintiff duly demanded the convicts of the superintendent, who refused to furnish them. The Board of Control did not forbid the superintendent to furnish them. The validity of the contract has not been questioned by the Board of Control or by the Territory. The defendant alleges in his answer (fol. 45) that his sole reason for refusing to comply with the plaintiff's demand was that the governor so advised and directed him.

ARGUMENT.

The attention of the court at the outset is respectfully called to the following extracts from the laws of Arizona:

"The board of commissioners shall lease from time to time as it can be done to advantage convict labor to be employed by the lessees * * * but any corporation, firm or person leasing any of such convict labor shall employ the same within the prison walls" * * *

Rev. Statutes, § 2424.

"SEC. 8. All powers and duties now devolved on any of the various boards for the government of the insane asylum, territorial prison or reform school, or required to be performed by them under existing laws are hereby conferred upon the Board of Control created by this act, and it is

hereby made the duty of the Board of Control created by this act to perform all duties required of said boards by existing laws. * * *

"SEC. 9. Said Board of Control * * * shall have full control over * * * the territorial prison * * * Said board shall have the authority to contract with responsible person or persons to furnish the labor of the inmates now within the said prison or that may hereafter be confined therein, or any number of them * * * and the said board may contract to allow such labor to be performed at any place either inside or outside the prison walls." * * *

Laws 1895, chap. 19.

"All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority."

Rev. Stat., § 2932, 2.

"The writ of mandamus may be issued by the supreme or district court to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person."

Rev. Stat., § 2335.

"This writ *shall* be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It shall be issued upon affidavit on the application of the party beneficially interested."

Idem., § 2336.

The issues presented by the pleadings are :

I.

Is the act creating the Board of Control valid ?

II.

If so, is the contract between the Board of Control and the plaintiff valid ?

III.

If so, has the plaintiff a right under such valid contract to the writ of mandamus which is prayed for ?

I.

The validity of the law creating the Board of Control has been attacked upon the grounds :

(A.) That the power to enact such a law was not granted by the organic law.

(B.) That the said law creates a territorial indebtedness, and is therefore within the inhibition of the Harrison act.

(C.) That the said law grants a special privilege to the plaintiff, and is therefore against the provisions of the Harrison act.

(D.) That the said law provides for inflicting punishment upon the convicts, to wit, hard labor, which is not provided for by the penal code, and is therefore *ex post facto* legislation as to all prisoners whose crimes were not committed before its enactment.

(A.) The statute creating the Board of Control is an enactment clearly within the powers conferred upon the legislature by the organic act.

"The local legislature has been entrusted with the enactment of the entire system of municipal law. * * *

"The powers thus exercised by territorial legislatures are nearly as extensive as those exercised by any State legislature."

Harbuckle *vs.* Toombs, 18 Wallace.

(B.) The law creates no indebtedness. It by terms appropriates money out of the general fund to pay for any expenses that may be made necessary by its enactment.

The question of indebtedness can under no circumstances be raised until the operation of the statute actually creates debt.

State *vs.* McCauley, 15 Cal., 430.

(C.) The law does not confer any special privilege whatsoever. It is a general law in its entirety.

(D.) By section 2424 of the Revised Statutes of Arizona, enacted on the 10th of March, 1887, it was provided that the Board of Commissioners should lease the convicts in the territorial prison. The legislature has full authority over the convicts and all persons sentenced to imprisonment are sentenced subject to the duty of the Board of Commissioners to lease their labor.

State *vs.* McCauley, *supra.*

II.

The defendant contends that the contract set forth in the complaint is invalid on the ground that it is unconscionable, inequitable, and without consideration moving from the plaintiff.

The contract provides that the Territory guard, clothe, and feed the prisoners, and that the plaintiff pay to the Territory for the labor of such prisoners the sum of 70 cents per day in water rights out of the canal to be built by the plaintiff, at the rate of $20 for a water right upon each acre of land.

It is not denied that 70 cents a day is unusually high return for convict labor, nor that $20 for an acre water right is a fair price for a water right under the canal proposed to be built by the plaintiff. The contention is that inasmuch as the canal is not constructed, and may never be, a water right has no value.

It is alleged in the affidavit attached to the plaintiff's complaint that 10,000 acres of water rights have been sold for $20 per acre in money to *bona fide* purchasers.

The plaintiff respectfully submits that this is conclusive evidence of the adequacy of the consideration.

The plaintiff respectfully calls the attention of the court to the fact that by section 2424 of the Revised Statutes of Arizona enacted in 1887 the Board of Commissioners of the prison were under a mandatory duty to lease the convict labor, but only for employment within the prison walls.

By the law of 1895, creating the Board of Control, all the said duties which rested upon the Board of Commissioners

were imposed upon the Board of Control, but it was provided that the Board of Control might lease the convict labor *outside the confines of the prison.* The reason for this change in the language of the statute is obvious. The Board of Commissioners for eight years were unable to find a lessee or to procure employment for the convicts in the prison; for eight years the prisoners remained an idle charge upon the Territory. It was thought by the legislature that to permit the prisoners to be worked outside of the prison walls would enable the Board of Control to find a lessee. This contract is the result of such change of legislation.

The construction of the proposed canal will, according to present estimates, cost twelve hundred thousand ($1,200,000) dollars. It will irrigate between seventy (70) and eighty (80) thousand acres of land. The cost of inducting water upon the land will be between fifteen ($15) and twenty ($20) dollars per acre.

One hundred (100) prisoners at 70 cents a day will earn twenty-one thousand ($21,000) dollars in a working year of three hundred (300) days, or two hundred and ten thousand ($210,000) dollars during the entire life of the contract.

The construction of the canal will therefore call for the expenditure of one million ($1,000,000) in money, in addition to the labor of the convicts.

As the water-right conveyance to be given to the Territory in consideration for the labor provides that the Territory shall have a "vested and indefeasible interest in the canal" of the plaintiff, the rights of the Territory cannot be impaired or cut off by any indebtedness contracted by the plaintiff.

If the company should fail before the completion of the

canal, the company would lose all moneys which had been expended by it, but the Territory would still own its interest in the partly completed structure, and the wealth invested in such structure would represent five times as much as the labor which had been provided by the Territory. The Territory, therefore, cannot lose under the contract, and is bound eventually to receive a greater consideration for its labor than is received by any State in the Union.

The State of California leased its convict labor to a water company at Folsom under somewhat similar terms. The State received as consideration for its labor the right to certain power, which did not exist until after the completion of the work upon which the convicts were employed.

The contract upon its face is fair and equitable and shows no sign of an inadequate consideration. The interest of the Territory in the completion of the canal is far greater than the consideration directly received for the labor. The completion of the canal will add ten millions of taxable property to the wealth of the Territory. It will be a great public benefit, and it is entirely to the best interests of the Territory that its construction should be encouraged.

"Mere inadequacy of price or any other inequality in the bargain is not to be understood as constituting *per se* the ground to avoid a bargain in equity.

"Whether one's bargains are wise and discreet, or profitable or unprofitable, or otherwise, are not considerations for courts of justice, but for the party himself to deliberate upon.

"Inadequacy of consideration is not of itself a distinct principle of relief in equity. Common law knows no such principle. *The consideration, be it more or less, supports the contract. Common sense knows no such principle. The value*

of a thing is what it will produce. In order that courts of equity should interfere in the execution of a contract the unconscionableness or inadequacy should be such as would shock the conscience and *would amount in itself to conclusive and decisive evidence of fraud.*"

1 Story's Equity Jurisprudence, sections 244, 245, and 246.

Osgood *vs.* Franklin, 2 Johnson's Chancery, 1.

"Inadequacy of consideration, if it be of so gross a nature as to amount *in itself to conclusive and decisive* evidence of fraud is a ground for cancelling the transaction. In such cases the relief is granted not on the ground of inadequacy of consideration, but on the ground of fraud as evidenced thereby."

Kerr on Fraud and Mistake, page 187, and cases there cited.

Bispham's Principles of Equity, section 219, and cases there cited.

The fact that one of the parties to the contract at bar is a sovereign does not alter the principles above set forth.

Commonwealth *vs.* Proprietors New Bedford Bridge, 2 Gray, 339.

Where one of the parties to a contract is a State, it is not necessary that any consideration should move from the individual to the State.

"It is now too well settled to admit of debate that the State may enter into a valid contract with a private person and that it is not necessary in order to support such a contract that there should be a consideration moving from the party to the State. It will be sufficient if on the faith of the contract the other party had been induced to invest his

money or to employ his time and labor in the furtherance of the enterprise which is the subject-matter of the contract."

Floyd *vs.* Blanding, 54 Cal., 41.

The case at bar comes clearly within the principles set forth in the case last cited. It would have been both legal and proper for the Territory to have leased its convict labor without any consideration whatsoever, if it had been deemed that such leasing would inure to the public good and to the benefit of the Territory. The contract set forth in the petition contemplates millions of dollars of direct increase to the taxable property of the Territory. On its faith large sums of money have been invested and spent.

"In a contest between two individuals, claiming under an act of a legislature, the court cannot inquire into the motives which actuated the members of that legislature. If the legislature might constitutionally pass such an act; if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit between individuals founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the legislature which passed the law.

"When a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights.

"A party to a contract cannot pronounce its own deed invalid, although that party be a sovereign State. A grant is a contract executed."

Fletcher *vs.* Peck, 6 Cranch, 87.

The benefits to flow from the completion of the canal constitute a legal consideration, even if no direct consideration passed to the Territory from the company.

III.

The discussion of the right of the plaintiff to the mandamus prayed for involves two considerations:

(A.) In general, should a mandamus issue?

(B.) If so, is the defendant Nugent the proper party against whom the writ should be directed?

(A.) A writ of mandamus should issue to "compel the admission of the plaintiff to the use and enjoyment of its right" to the exclusive control of the convict labor, from which it is precluded by the action of the defendant.

The language of the contract is clear and explicit. Under its provisions the convict labor belongs exclusively to the plaintiff. There is no remedy whereby the plaintiff can obtain the possession of its own except the issue of this writ.

"A mandamus is a prerogative writ to the aid of which the public is entitled upon the proper case previously shown to the satisfaction of the court. The original nature of the writ and the end for which it was framed direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice and defect of police; therefore it ought to be issued upon all occasions where the law has established no specific remedy and *wherein justice and in good government there ought to be one.*"

Rex *vs.* Barker, 3 Burrow, 1267.

This general principle laid down by Lord Mansfield is the foundation of all the law on the subject of mandamus. It

has been followed and adopted by the Supreme Court of the United States and by most of the State courts.

United States *vs.* Madison, 1 Cranch, 170.
La Grange *vs.* State Treasurer, 24th Michigan, 468.
Com. *vs.* Dennison, 24th How., U. S., 66.

Plaintiff submits that there is absolutely no remedy whereby it may enjoy its rights under this contract except the remedy by mandamus.

A Territory cannot be sued. An action for damages or for specific performance would not lie. Therefore the plaintiff is entitled, if the contract be held by the court valid, to the writ prayed for.

Langford *vs.* King, 1 Mont., 33.

In this case the court says:

"Montana Territory is a government created, it is true, by a law of Congress, yet that law gives it very extensive powers. The reason of the law which declared that no government can be sued without its consent applies to this territorial government as well as to any other government. We hold, therefore, that unless permitted by some law of this Territory or of the General Government no citizen can sue it. There is no law of this Territory or act of Congress permitting it. There is then no legal power to enforce territorial contracts. In other words, there is no obligation to territorial contracts. They rest simply upon the good faith of the Territory."

In the case of Fiske *vs.* Cuthbert, 2 Mont., 508, this doctrine was affirmed. The court awarded the writ of mannamus, saying:

"What was the remedy of the respondents? They cannot enforce their claim by an action against the Territory."

If the court should not concur in this doctrine laid down by the Montana courts, it is still submitted that, even though a Territory may not plead the sovereign power and is liable to suit, still the plaintiff is entitled to the writ of mandamus on the ground that it has no plain, adequate or speedy remedy at law.

An action for damages would clearly be neither plain, speedy, nor adequate. An action for specific performance is not a remedy at law, but in equity, and it has been expressly held in many cases that a remedy by suit in equity is not such a remedy at law as will defeat the right to mandamus.

La Grange *vs.* State Treasurer, 24th Mich., 468.
People *vs.* Mayor of New York, 10 Wendell, 393.

Decisions may doubtless be found wherein the court in rendering opinions has given expression to isolated sentences which might be construed against the right of a person to a mandamus in cases somewhat similar to the one at bar.

Notably is this so in the case relied upon by the defendant, to wit, People *vs.* Du Laney, 96 Ill., 543.

In the Du Laney case the contract with the State was held to be invalid, the contracting parties not having fulfilled the requirements of the law.

It is emphatically asserted on behalf of the plaintiff that no case can be found in any English or American report wherein a plaintiff has been denied the right of mandamus, when by reason of such denial he was entirely precluded from any valuable

right. In all cases where the right has been denied it will be found that the court denying it has pointed out a process whereby the party might still find a clear road to justice.

The attention of the court is particularly invited to the case of La Grange *vs.* State Treasurer, 24th Mich., 469, in which the doctrine that the court will issue the writ of mandamus whenever true justice requires it is laid down and discussed with great learning:

"The jurisdiction of this court in mandamus cases is not statutory but *plenary.* * * * In granting this remedy courts are always disposed to confine it to cases where there is no other adequate specific remedy. But the existence of a remedy of another nature, which is not adequate, furnishes no reason for refusing it if the *necessity of justice requires it.*

"We had occasion in La Grange *vs.* State Treasurer, 24th Mich., 468, to consider this jurisdiction quite fully, and we think the views there expressed are in accordance with the soundest authority.

"Mandamus is a prerogative writ designed to afford a summary and specific remedy in those cases where without it the party will be subject to serious injustice.

"As pointed out by the eminent authorities there cited, it is from its very nature a remedy *that cannot be hampered by any narrow or technical bonds.* The right, coupled with the necessity of such a vindication of it, supports the jurisdiction, and the court in using its discretion, while careful not to use this writ when it is not essential, will apply it where it is. * * *

"*It is well settled that the existence of a specific remedy in equity does not oust the legal jurisdiction, but only appeals to the discretion of the common-law court.*

"Mr. Spence in his treatise on equitable jurisdiction refers to the jurisdiction in mandamus as one which if fully exercised might have rendered much of the interference of equity needless."

1 Spence, Equity Jurisprudence, 704.

Tamas Railroad Co. *vs.* The Circuit Judge for Tasco County, 44 Mich., 479.

The Revised Statutes of Kansas authorized a mandamus to issue only: "To compel the performance of an act which the law especially enjoins as a duty resulting from an office trust or station."

Compiled Laws of Kansas, page 696.

The courts in that State have issued a mandamus on the relation of a citizen against the secretary of state of Kansas, the practical effect of which was to enforce an *executory* contract made by the relator with the State of Kansas; which contract the State by legislative enactment had endeavored to repudiate.

State *vs.* Barker, 4 Kas., 324–435.

In the State of New York, where the language of the statute is not nearly so comprehensive as that of the Arizona statute, the principle is laid down by the courts and followed in numerous cases in this language: "To entitle a party to a writ of mandamus he must show himself legally and equitably entitled to some right properly the subject of the writ, and that it is legally demandable from the person to whom the writ is directed."

People *vs.* Hayt, 66 N. Y., 607.

People *vs.* Canal Appraisers, 73 N. Y., 443.

The extreme lengths to which the court will go in imposing a duty upon the party against whom the right is sought, when the relator has a clear right and has no way of enforcing such right, except by the writ of mandamus, is exemplified in the case of The People *vs.* The German Hospital, 8 Abbot New Cases, 332. In that case there was absolutely no duty on the part of the respondent, but the writ was issued against it on the purely ethical ground that the plaintiff had a right, and that every right involves a duty somewhere, and inasmuch as the plaintiff could not enjoy her right unless the writ were issued, the duty was implied and the court awarded the writ.

"Although no action lies against the sovereign for a breach of contract, yet whenever that contract in any form comes before the court the rights and obligations of the parties to it must be adjusted upon the same principle as if the contracting parties were private persons."

People *vs.* Stevens, 71 N. Y., 527.

(B.) Nugent is the proper party against whom the writ should be directed.

The attention of the court is particularly invited to the fact that Nugent and not the Territory of Arizona is the defendant in this proceeding. The Board of Control did not object to the carrying out of this contract. It does not appear that such board gave any instruction whatsoever to Nugent with respect to it.

The Territory of Arizona has not attempted to repudiate it.

The Board of Control has not questioned its validity nor directed the superintendent to refuse to deliver the convicts to the plaintiff.

In his answer the defendant specifically alleges his contumacy.

He confesses that he refused the plaintiff's demand in obedience to the advice and direction of the governor of the Territory, "and not otherwise" (fol. 45.)

The governor is a minority member of the Board of Control, and as governor had no authority whatsoever in the premises.

By the terms of the contract the superintendent is "required" to furnish the convicts upon demand.

The statute defining the duties of the superintendent is meager. As a matter of fact, he has full charge of the convicts and the prison. It is so alleged in the complaint and not denied.

His authority alone bars the way to the "admission of the plaintiff to the enjoyment" of its right.

Every right involves a corresponding duty.

The legislative act gives the board the power to make the contract as well as "full control" over the prisoners and inmates. In respect to the contract the powers of the superintendent are necessarily subordinate to the powers of the board. He has no power to question the expediency, policy, judiciousness, or advisability of the legal acts of the board, or to disregard and set at naught its lawful promises, contracts, and obligations. No statute gives him this negative power. To the contrary, it is his official duty to observe the lawful directions and commands of the board and to carry out its valid contracts. Such a duty is a necessary incident to his office; any other result would attribute to the legislature the stupidity of giving to the board the power to make the contract and to the superintendent the power to cancel it.

Suppose this was a proceeding by the board to compel the superintendent to deliver the convicts in accordance with the contract, can it be seriously questioned but that his obedience would be enforced by the writ? Assuming that the board could sue out the writ to enforce this duty, there can be no well-founded reason to deny the use of the same remedy to the party beneficially interested. The contract expressly requires the superintendent to deliver the convict labor, and is to be construed as a direction from the board in this respect—a direction or command from a superior to an inferior officer in immediate charge of the convicts, whose ministerial duty must put the machinery in motion to execute the contract. The writ only lies against the party whose legal duty it is to perform the act required, and for this reason the Board of Control is not a necessary party to this proceeding.

The People *vs.* Brennan, 39 Barb., 522 at page 536.
The People *vs.* Common Council, 3 Keyes, 81.
Farrel *vs.* King, 41 Conn., 447.
People *vs.* Palmer, 35 N. Y. Supp.

If the Board of Control, his official superiors, had directed Nugent not to deliver the convicts, it may be that the board would have been a necessary party to this action.

The plaintiff was advised that the Board of Control was in favor of the execution of the contract. Two of its members had signed it. The board had done no act upon which a proceeding against them could have been based.

If the defendant in his answer had alleged as reason for his refusal that he had been forbidden by the Board of Control, or even that he awaited positive instruction from

the board, it might have been proper or necessary for the plaintiff to amend its complaint and make the Board of Control a party.

But the defendant made no such allegation. He totally disregarded his lawful superiors and avowed that his conduct was regulated entirely by the direction of another person.

It is further submitted that it is not material whether the Board of Control should or should not have been made a party. To all intents and purposes, they have been represented in the entire litigation.

If this court should arrive at the conclusion that the plaintiff is entitled to a mandamus, but that the Board of Control was a necessary party, there would be no objection even now to permitting the plaintiff to amend his complaint. At most it would be a matter of the adjustment of costs.

In conclusion, the appellee rests its right to a mandamus upon the broad principle laid down by Lord Mansfield and Chief Justice Taney in the cases cited and on the very comprehensive language of the statute of Arizona.

The plaintiff confidently asserts that not a single case can be cited where the writ of mandamus has been refused to one applying for it when such refusal would leave the plaintiff deprived of a right.

Respectfully submitted.

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